



# Community Brief

## Religious Freedom and Discrimination in America – Then and Now: *Lessons Learned for American Muslims and their Allies*



In the anti-*sharia* laws being enacted today in states across the country, we see a modern-day example of laws targeting one group but ultimately affecting many others. In evaluating the significance of these laws and formulating solutions, it is important to place them in the broader context of American history and the struggles other religious groups have faced.

## About the Author



**Asma T. Uddin** joined The Becket Fund, a non-profit legal firm dedicated to defending religious liberty in the U.S. and around the world, in 2009 after practicing commercial litigation at large national law firms for several years. She currently serves as Legal Counsel at the Fund.

Asma speaks widely on issues of gender and faith, and national and international religious freedom. She is also the Founder and Editor-in-Chief of *altnmuslimah.com*, a web magazine dedicated to issues on gender and Islam.

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## WHY THIS PUBLICATION?

In the anti-*sharia* laws being enacted today in states across the country, we see a modern-day example of laws targeting one group but ultimately affecting many others. In evaluating the significance of these laws and formulating solutions, it is important to place them in the broader context of American history and the struggles other religious groups have faced.

As part of ISPU's larger project, *Islamophobia: A Threat to All*, this brief puts the campaign for anti-*sharia* and anti-foreign law statutes within a broader historical context, beginning with an analysis of anti-Catholic laws, including current controversies and strategic responses. The focus is on 1) Blaine Amendments, which were designed to limit Catholic influence in public schools, and 2) anti-religious garb statutes. The Blaine Amendments are now used more broadly to limit the participation of any religious school in state-funded programming. This analysis is done in parallel with more recent laws that attempt to target Muslims, specifically anti-*sharia*/anti-foreign law statutes.

Taking this contextualized approach provides three key benefits:

1. **It provides American Muslims a historically-grounded view of their current status in their nation.** They are not alone, or unique, in their experiences of discrimination.
2. **It gives American Muslims a source of guidance to develop solutions.** In other words, "How have other faith communities successfully countered biased laws and policies?"
3. **It explains to Americans of other faiths how anti-sharia laws affect them.** Doing so provides a compelling reason, beyond moral persuasion, to also be invested in countering these measures.

"American Muslims are not alone, or unique in their experiences of discrimination."



# Key Findings

As Catholic immigration to the U.S increased throughout the nineteenth century, so did anti-Catholic animus. American nativists claimed that the Catholic Church acted as a foreign entity with monarchical tendencies, portraying the Catholic Church as incompatible with American democracy, and calling into question the loyalty of Catholic citizens. Ultimately, anti-Catholic sentiment culminated in the formation of a political party, the Know-Nothing Party, which sought a type of political purity.<sup>1</sup>

These allegations bear a marked resemblance to how American Muslims are described post-9/11, and are also related to how other minority groups are described.

## Blaine Amendments

- Catholic efforts to secure public funding for parochial schools were often met with violence. For example, during the Philadelphia Kensington Riots in 1844, nativists burned down Catholic houses and churches.<sup>2</sup> Nativists sought legislation to block funding to Catholic schools and Catholic influence over American public life. Referred to as Blaine Amendments, this type of legislation is a form of state law that seeks to prohibit any money raised through taxes to be “under the control of any religious sect.”<sup>3</sup> Currently, some version of a Blaine Amendment can be found in 30 state constitutions.<sup>4</sup>
- These laws are now applied to any religious institution and 1) prohibit the funding of charitable work of faith-based institutions (counseling, training, food delivery), 2) affect contracts between states and faith-based institutions, 3) limit choices in school voucher programs, and 4) curtail laws that are religion neutral, but that may benefit the charitable work of faith-based organizations.

## Anti-Religious Garb Statutes

- Roman Catholics were a visible part of American life, particularly nuns in their religious dress. Pennsylvania and Nebraska still have these laws in effect. More than 100 years after being enacted, the law in Pennsylvania was used against a Muslim schoolteacher wearing a *hijab* (headscarf)<sup>5</sup> and a

similar law in Oregon, before it was repealed, was also enforced against religiously-observant Sikhs seeking to teach in public schools.<sup>6</sup>

## Anti-Sharia/Anti-Foreign Law Legislation

- From 2010 to 2013 at least 32 states introduced anti-*sharia* bills. Of the 92 bills identified as introduced during that time, 21 expressly mentioned *sharia*, whereas the remaining 71 had broader language similar or identical to the “American Law for American Courts” (ALAC) model legislation.<sup>7</sup>
- The bills fall into one of three categories; those that 1) list *sharia* specifically, 2) list *sharia* with other laws, including *halacha*, canon law, and *karma*, or 3) mention “foreign law” or “international law.”<sup>8</sup> Both the super-specificity and the generality that are used by these bills to describe *sharia* speak to a lack of awareness as to what *sharia* is. The use of *halacha*, canon law, and *karma* indicate a broader fear of the “other,” which parallels the fears of over a century ago.

## Legal Advocacy

### ***Constitutional Challenges to the Blaine Amendments***

- The anti-Catholic roots of Blaine Amendments raise constitutional concerns under the Free Exercise Clause and the Equal Protection Clause, which gives each American the right to “equal protection of the laws.” If a law treats different groups of people differently, the government has to provide a “rational basis” for the law. When distinctions are made based on “suspect classifications,” the government must adhere to a much higher legal standard of evidence to protect peoples’ rights and liberties. Courts have suggested that religion is one such classification.
- Blaine Amendments use religion-based classifications. While supporters argue the Amendments strengthen the separation of religion and state, that goal does not mean religious organizations have to be prohibited from receiving state funding. Moreover, the laws’ roots

# Key Findings continued

in anti-Catholic hate demonstrate that the intent behind the Amendments is to discriminate against a particular religious group, not to further church-state separation.

- Under the **Free Exercise and Establishment Clauses**, the government cannot treat religion with special disfavor, or disfavor one religion over another. Because the Amendments exclude religious organizations merely because of their status and do not support even secular activities at religious organizations, they raise concerns under the Free Exercise Clause.

## **Legislative Repeals**

- Several states have asked voters to evaluate their state's Blaine Amendment. The Amendments have been reconsidered in constitutional conventions and via state referenda.
- Anti-religious garb statutes have been repealed, with the exception of Pennsylvania and Nebraska. Oregon repealed its anti-garb statute in 2010 in response to efforts by a coalition of faith-based and civil liberties organizations. Key to the success was the revealing that KKK sympathizers originally sponsored and passed the bill.

# Key Recommendations

## To Legal Advocates

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- Depending on the specific type of anti-*sharia* law at issue, the law can violate the **Free Exercise Clause** and **Establishment Clause** in one of two ways.<sup>9</sup> First, if it is motivated by anti-religious or anti-Muslim animus. Second, if on its face or in its application, the law:
  - Excludes consideration of arbitration only when based on religious law (favors non-religion over religion);
  - Excludes consideration of arbitration only when based on *sharia* (favors non-Muslims over Muslims)
- A law also violates the **Free Exercise Clause** if it:
  - Gives the government discretion to provide individualized exceptions based on the reasons for the underlying conduct;
  - Is selectively enforced against religious conduct;
  - Is crafted in a way that it applies almost exclusively to religious conduct.

## To Non-Profits and Mosques

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- Create coalitions to work against discriminatory laws.
- Educate membership on the effects of discriminatory laws.
- Remind membership that discrimination against one group may lead to discrimination against others, including one's own group.
- Find appropriate legal counsel to challenge discriminatory laws.

## To Individuals

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- Engage with other faith communities and understand their histories in America.
- Become well versed in the individual rights and responsibilities of an American citizen.
- Work on challenging laws and practices that discriminate against any group of people.

# Background

Religious believers today are suffering from new and old laws enacted on the basis of animus. Many of the older laws targeted specific religious groups, but now affect people of all faiths. For example, the Blaine Amendments, originally enacted to bar Catholic influence in education, are still on the books in many states and are used to limit the participation of *any* religious school in state scholarship programs, state textbook lending programs, etc.

Similarly, anti-religious garb statutes, originally enacted to bar Catholic nuns and priests from teaching in public schools, in more recent times have been used against Muslim and Sikh public school teachers. Until Oregon's recent repeal of its statute, the statute survived a legal challenge by a Sikh convert who wanted to wear her turban while teaching in public school. And Pennsylvania's anti-garb statute, still on the books, was used to deny a Muslim teacher in Philadelphia her right to wear a headscarf.



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# Implications

## For Muslims

- On their face, certain kinds of anti-*sharia* laws single out Muslims from all other religious adherents who choose religious arbitration. This creates stigma and relegates Muslims as political outsiders, which, according to David Yerushalmi—the author of template anti-*sharia* bills used around the country—is the main intent of these laws.<sup>10</sup>
- Anti-*sharia* laws would affect the enforceability of Muslim wills and marriage contracts if they contain religious terms or references and inhibit Muslims’ religious practices by prohibiting even the most basic *sharia* considerations.<sup>11</sup> Three categories of negative impact are worth mentioning:

### 1. *Relevance of Sharia to the Background of a Dispute*

For example, a judge could not enforce an employment contract where an employer allows a Muslim employee to work different hours during the month of Ramadan. Such a contract would be unenforceable because a judge would not be able to consider what Ramadan is.

### 2. *The Relevance of Sharia to a Judge’s Decision-Making Process*

If a judge seeks to craft a visitation order for a custody dispute between two Muslims, fairness to the litigants suggests that the timetables of their needs to perform religious duties be given consideration. Yet anti-*sharia* laws seem to disallow even such basic religious considerations. In an effort to come up with an equitable solution, a judge may need to consider the content of a litigant’s *sharia* obligations.

### 3. *Unequal Protection of the Courts for Sharia-Based Arbitration Tribunals*

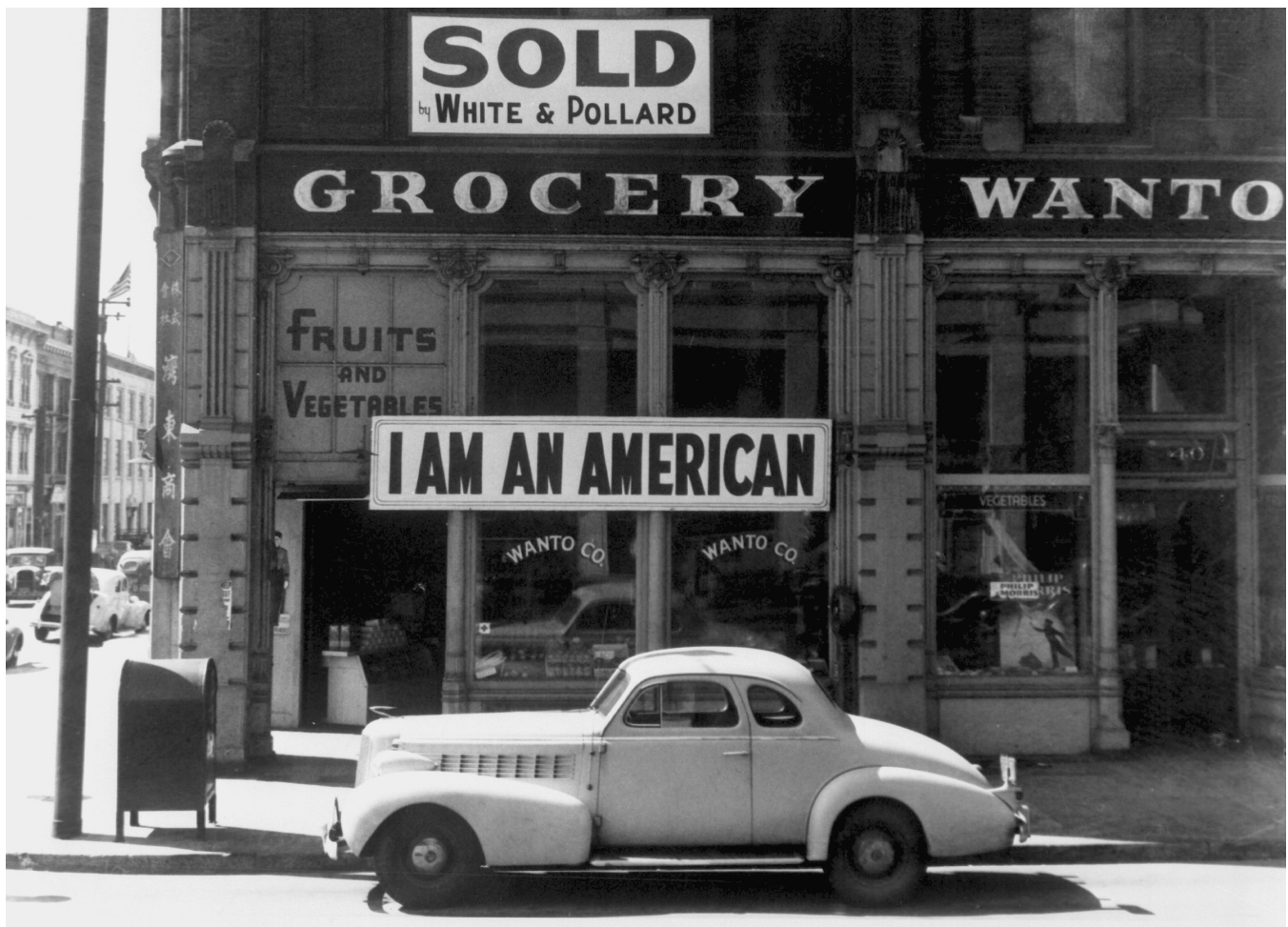
Anti-*sharia* laws seek to prevent Islamic religious arbitration. As such, specifically anti-*sharia* laws would provide a substantially inferior level of court protection to litigants who use *sharia*-based alternative dispute resolution than to litigants who use alternative dispute resolution options based in Christian or Jewish religious principles.

## For The Public at Large

- If Muslim religious arbitration is outlawed, it will affect religious arbitration for other religious groups too.
- If *sharia* is considered “foreign law,” then other religious law may be as well, including canon law, and halacha.
- International trade will be negatively impacted, as contractual stipulations may become unenforceable.

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## Endnotes

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RESEARCH MAKING AN IMPACT

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